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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 290 71.

JOHN J. MOORE, Trading under the Firm Name of J. J. Moore & Co., Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

APPELLANT'S BRIEF.

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HERMAN T. ELLIOTT PRINTING CO.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 340.

JOHN J. MOORE, Trading under the Firm Name of J. J. MOORE & COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

The Facts.

On the 21st day of June, 1898, the claimant entered into a contract with the United States (p. 7, Art. I) to furnish and deliver, subject to the inspection of an agent of the United States, to the Quartermaster's Department of the United States Army at Honolulu, "delivered at the wharf, at the rate of not less than one hundred (100) tons per

day, about thirty-nine hundred (3900) tons of best merchantable Walsend Australian steam coal, at twenty-two hundred and forty (2240) pounds to the ton, dangers of the sea and any causes beyond their control excepted."

It was further contracted (p. 7, Art. III) "that deliveries on this contract shall commence on the arrival of the British ship *Euterpe* at Honolulu on or about July 23, 1898."

In Article I of the contract (p. 7) it was stipulated that the Government would pay for the coal at the rate of nine dollars per ton in gold coin of the United States.

Two days later, or June 23, 1898, the claimant entered into another contract with the United States (p. 8, Art. I) by which he agreed to furnish and deliver, subject to inspection of a duly appointed agent of the United States, to the Quartermaster's Department of the Army at Honolulu, "delivered on wharf as customary, at a rate of not less than one hundred (100) tons per day, of about five thousand (5,000) tons of best quality Australian Seaham, Walsend, or Pacific Co-operative steam coals, at twenty-two hundred and forty (2240) pounds to the ton, dangers of the sea and any causes beyond their control excepted."

It was also contracted (Art. III, p. 8), "that deliveries on this contract shall commence with a cargo of about twenty-two hundred (2200) tons of coal, to arrive at Honolulu, Hawaiian Islands, on or about the first day of October. 1898, and to sail

from Australia in about twenty-five (25) days after signing of this contract."

By Article V, page 8, it was contracted that the United States would pay for this coal nine dollars ($9.00) per ton in gold coin of the United States.

Preliminary to the making of these contracts the correspondence was had which is set forth in terms on pages 9, 10, and 11. Claimant began the correspondence in June, 1898, by offering a cargo of coal which should be "delivered at Honolulu, H. I., per British ship *Euterpe*," and he also offered another cargo of coal which should be "delivered at Honolulu at the same price, terms, and conditions as the *Euterpe*." Then follows a letter from the Quartermaster accepting the cargoes of the two ships "for delivery in Honolulu."

On the 21st and the 22d days of June, 1898, the claimant wrote letters offering five thousand tons of coal, "to be delivered at Honolulu prior to October 1, 1898, perils of the sea excepted, * * * to be delivered on wharf as customary."

On the 22d of June, 1898, the Quartermaster wrote, accepting the offer of the five thousand tons delivered "at Honolulu," and advising claimant that "contract will be drawn immediately."

It will be seen by the letter of June 22, 1898 (p. 11), that these contracts were to be drawn by the Quartermaster, a fact which we will consider later on, and there is abundant internal evidence that they were so written. (See the contracts.)

It was pursuant to this correspondence that the two contracts were drawn and executed.

At the time these contracts were made it was the custom at San Francisco, where all this business was transacted, as the record shows, between shippers and ship-owners, to insert in their charter-parties a stipulation to the effect that cargoes were to be discharged as customary, in such customary berth or place as assignee shall direct, ship being always afloat, and at an average specified number of tons per weather-working day (Sundays and holidays excepted), and to commence when ship is ready to discharge and notice thereof has been given by the captain in writing, and if detained over and above the said laying days, demurrage to be at 4d. a registered ton per day. This stipulation was duly inserted in the contracts of the claimant with the ships employed by him to transport the coal mentioned in the contract. It is not shown that the officers and agent of the Government, who were authorized to make, and did make the contracts thereafter, had knowledge or notice of such custom, nor that the contracts, or either of them, were made in view of that custom. In other words, it does not affirmatively appear by direct testimony, according to the finding of the court (III, p. 11) that the officers of the United States had knowledge or notice of the custom, or that the contracts were made in view thereof.

Finding V, pages 11, 12, sets forth in detail the arrival of the ships, and the dates thereof, at Honolulu, and gives the details as to the delays there encountered, and the other facts which are essential to the consideration of a claim for de-

murrage. The court also finds that "it does not appear that the defendant was at fault either in the loss of time in arriving at the wharf or in the discharge of the cargo afterwards. The court finds the defendant was able, ready, and willing to receive the cargo as rapidly as discharged at the wharf. The claimant paid to the ship-owner $1,053.36 for these delays."

A similar finding in effect was made by the court (top of p. 12) concerning the bark *Harvester* and the ship *General Gordon*, but there is some difference in the details. The court also finds that "in the case of each ship the defendant had notice in writing of their respective arrivals within twenty-four hours thereafter. The wharves at Honolulu are under the control of a harbor-master. The practice of such harbor-master was to assign ships to berths at the wharf in the order of their respective arrivals; and this practice was followed by him in respect to the ships mentioned." Then the court finds that the claimant paid the "ship-owners for delays $1,433.12 for the *Harvester* and $744.48 for the *General Gordon*. All coal delivered was paid for by the defendant."

The sixth finding (p. 12) is as follows:

"At the time of the delivery of the coal mentioned in the foregoing findings the Honolulu harbor had eleven docks or wharves, three of which only were used for the discharge of coal. The docks were crowded, and several vessels were moored at the reef. By local regulations of the Government, a harbor-master had general supervision of all vessels

in the harbor, and all vessels were anchored and assigned to berths, in the order of their arrival, by the harbor-master. There were no lighters for public use, and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharves, and was subject to local regulations and the order of the harbor-master, the same as individuals."

We have thus summarized and quoted from all the findings (pp. 7 to 12) that relate to the subject of the claims for demurrage.

The Law.

The court concluded (top of p. 13) that the claimant was not entitled to recover, and his petition was dismissed.

The majority opinion of the court below was written by Judge Wright (pp. 13 to 16). That opinion, as we think, contains a number of errors, which we will now endeavor to point out.

I.

Interpretation Against Party Who Wrote Contract.

The opinion wholly ignores the existence of the well-established rule that the words of an agreement will be taken most strongly against the party who prepares it, and any liberality of construction will be in favor of the party who simply signs it;

it will be construed most strongly against the party who uses the language.: *Garrison* vs. *U. S.*, 7 Wall., 688, 690; *Chambers* vs. *U. S.*, 24 C. Cls., 387, 392; *Simpson & Co.* vs. *U. S.*, 31 C. Cls., 217, 243; *Edgar & Thompson Works* vs. *U. S.*, 34 C. Cls., 205, 219.

In the last case cited Judge Weldon said (p. 219): "It is a most familiar principle of law that the words of an agreement are taken most strongly against the party who prepared it, and if any liberality of construction is to be indulged in it will be in favor of the party who simply signs, and not the party who signs and prepares the instrument for execution."

The findings of the court in the case at bar show that the contract was prepared by the officers of the United States, as we have seen, and therefore it follows that if doubt arises as to what interpretation should be put upon it, liberality of construction is to be indulged in favor of the petitioner. We think it will appear from a careful study of the majority opinion and of this brief that the court below acted upon the theory that there was no such rule of law.

II.

Custom of the Port of San Francisco.

The majority opinion of the court below challenged the soundness of the claimant's contention that the Government was bound by the custom at the port of San Francisco, relative to stipulations con-

tained in charter-parties, and consequently, in that regard, by the charter-parties also (see p. 8).

Finding III, p. 5, relates at length and with particularity what the custom was at San Francisco between shippers and ship-owners with reference to the insertion in their charter-parties of stipulations relating to the discharge of cargoes, notice of arrival of ships, lay days, etc., *and states that such "stipulation was duly inserted in the contracts of the claimant with the ships employed by him to transport the coal mentioned in the contract.*"

1. We submit that the existence of this custom operated so as to incorporate into the contracts between the claimant and the Government just such stipulations on the subjects above mentioned as were in fact inserted in the charter-parties between him and the ship-owners. In 2 Parsons on Contracts, side pp. 535-539, the learned author considers this subject and says:

"A custom which may be regarded as appropriate to the contract and comprehended by it, has often very great influence in the construction of its language. The general reason of this is obvious enough. If parties enter into a contract, by virtue whereof something is to be done by one or both, and this thing is often done in their neighborhood, or by persons of like occupation with themselves, and is always done in a certain way, it must be supposed that they intended it should be done in that way. The reason for this supposition is nearly the same as that for supposing that the common language which they use is to be taken in its common mean-

ing. And the rule that the meaning and intent of the parties govern, wherever this is possible, comes in and operates. Hence an established custom may add to a contract stipulations not contained in it, on the ground that the parties may be supposed to have had these stipulations in their minds as a part of their agreement when they put upon paper or expressed in words the other part of it. So custom may control and vary the meaning of words, giving even to such words as those of number a sense entirely different from that which they commonly bear, and which indeed by the rules of language, and in ordinary cases, would be expressed by another word.

This influence of custom was first admitted in reference to mercantile contracts. And, indeed, almost the whole of the law merchant, if it has not grown out of the custom sanctioned by courts and thus made law, has been very greatly modified in that way. For illustration of this, we may refer to the law of bills and notes, insurance, *and contracts of shipping generally.*"

In *Robinson* vs. *The United States*, 13 Wall., 363, 366, Mr. Justice Davis said: "Parties who contract on a subject-matter concerning which known usages prevail, by implication, incorporate them into their agreements, if nothing is said to the contrary."

Mr. Justice Blatchford, speaking for this court, cited *Robinson* vs. *The United States* in deciding the case of *Hostetter* vs. *Park*, 137 U. S., 30, 40, in support of this proposition: "It is well settled

that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages, by implication, into their agreements, if nothing is said to the contrary."

In *Houge* vs. *Woodruff*, 19 Fed. Rep., 136, 138, *Judge Brown said*: "*Where an established usage* has been proved, giving the merchant a right to, at least, one change of berth in the discharge of the cargo, he is not liable for the delay caused by the removal, because that is a part of the vessel's obligation. *Smith* vs. *60,000 Feet of Yellow Pine Lumber*, 2 Fed. Rep., 396, 400; *Moody* vs. *500,000 Laths*, Id., 607."

In *Pleasant* vs. *Pendleton*, 6 Rand. (Va.), 493, it was said: "An established usage * * * constitutes the common understanding of parties in their dealings; and on the foot of that common understanding, they are supposed to contract."

In *Barlow* vs. *Lambert*, 28 Ala., 704, it was said that customs are held as a part of the contract and are only binding because they are a part of it.

In *Foley* vs. *Mason*, 6 Md., 37, it was said that the theory of the law of usage rests upon the presumption that in certain transactions the parties did *not intend to expressly stipulate the whole contract by which they designed to be bound*, but that they intended to contract with reference to the known usage upon the subject, and that those usages were to be regarded as part of the contract.

In *Van Hoesen* vs. *Cameron*, 54 Mich., 609, it was held that parties contracting are supposed to do so with reference to the known usages and

customs which enter into and govern the subject-matter to which the contract relates, and all contracts made in the ordinary course of business, without particular stipulations to the contrary, are presumed to be made in reference to the usages and customs which exist.

In *McCulsky* vs. *Klosteman*, 20 Oregon, 108, it was said that in all contracts as to the subject-matter of which known usages prevail, the parties proceed on the tacit assumption of such usages, commonly reduce into writing the particulars of their agreement, but omit to specify those known usages which are included as of course by mutual understanding.

In *Lyon* vs. *Culbertson*, 83 Ill., 33, it was held that where there is a well-known usage which obtains in trade, it will be presumed that all who engage in that business, where it prevails, contract with a view to it, unless they exclude the presumption by their contract.

See, generally, on this subject Maclachlan on Merchant Shipping, 360, 361; Abbott on Shipping, 228; 1 Pars. Ship., 324.

2. The majority opinion of the court below then proceeds on the theory that, "by the plain terms of the contracts, the claimant had as effectually obligated himself to take the coal to the wharf as he had to cross the sea." We challenge the correctness of this view of the language used in the contracts. As we have heretofore shown, the language of the first contract is that the coal shall be

"delivered at the wharf," and that "deliveries on this contract shall commence on the arrival of the British ship *Euterpe* at Honolulu on or about the 23d day of July, 1898." The language of the second contract is that the coal shall be "delivered on wharf as customary," and that "deliveries on this contract shall commence with a cargo of about twenty-two hundred tons of coal, to arrive at Honolulu * * * on or about the first day of October, 1898."

We ask, who is to furnish the wharf? If the shipper is to do so, how is the Government to learn what wharf he has furnished? If the Government is to furnish it, how is the claimant to learn of the one chosen? Is it not natural and business-like that there should be some definite means of conveying notice or knowledge, and thus fixing responsibility? Is it not reasonable that the parties did not specify thus in the contracts because they knew the charter-parties between the claimant and the ship-owners would so specify?

Is the ship to be afloat or not? How is the consignee to be charged with the knowledge of the arrival of the ship at the port or the wharf? The contract, as written, contains no stipulation on that interesting subject, although it requires the coal to be inspected by an agent of the United States. That could only be done outside the ships. Is the Government to pay no fixed amount of demurrage if it should detain the ship? These are all matters of very great moment to the contracting parties, and yet there is nothing written in the contract on

these subjects. The reason why nothing was written in them on these most important subjects is very plain—the custom at San Francisco between shippers and ship-owners covered all of these topics and made that definite and certain which the written contracts sued on did not make definite and certain.

The court below does not pretend that there was any obligation on the claimant in the contracts in suit, except to take the coal to Honolulu and deliver it at the wharf for a certain price per ton about the dates named. This view makes these contracts the most narrow and the least consequential known to the books or to commerce. If cargoes could be carried in ships pursuant to contracts of that character only, it is safe to say that maritime freight rates would double instantly.

It is evident that the signatory parties were wiser than the majority opinion of the court below would have them be. In view of the fact that they did not write into the contracts anything at all on the very important subjects we have enumerated, it is apparent that they intended that the custom at the port of San Francisco should prevail and be binding upon them. In the absence of language to the contrary in the contract—and there is no such contrary language—it follows that these two contracts are to be interpreted by this court as if that custom had been incorporated in them in all its length and breadth.

The court below quotes from *Barnard* vs. *Kellogg*, 10 Wall., 390, in support of the theory that the whole subject-matter of the contracts was covered

by the written instruments in terms. We think no one would challenge the soundness of the views thus quoted. That case was before this court in *Robinson* vs. *U. S.*, 13 Wall., 363, 365, where Mr. Justice Davis said: "In *Barnard* vs. *Kellogg*. this court decided what proof of a custom or usage inconsistent with a contract and which either expressly or by necessary implication contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intentions of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and that such evidence was thus used on the theory that the parties knew of the existence of the custom or usage and contracted in reference to it. This latter rule is as well settled as the former, and under it the evidence was rightly received."

No language of ours could add to the force of the above quotation when turned against the position taken in the majority opinion of the court below.

We think that these authorities completely sustain our view that the custom at San Francisco was written into the contracts sued on by implication of the law.

III.

Knowledge of Custom.

The last sentence in Finding III, page 5, is to the effect that it does not appear that the officers and agents of the Government who made the contracts had knowledge or notice of the custom at San Francisco, nor that the contracts were made in view thereof. We submit that it is immaterial whether such officers and agents had that knowledge or not. In the case of *Hostetter* vs. *Park*, 137 U. S., 30, 40, this court, after speaking of a usage of the trade, said: "The same doctrine is applicable in the case of a bill of lading, *even though the usage be not known to the particular shipper*, if it be established as a general usage. *Phillips on Insurance*, secs. 980, 10003; *Thatcher* vs. *McCulloch*, Olcott, 365, 369, 370. *Lowry* vs. *Russell*, 8 Pick., 360, 362; *McMasters* vs. *Pennsylvania Railroad*, 60 Penn. St., 374; *Pittsburg Ins. Co.* vs. *Dravo*, 2 Phil., W. N. C., 194."

In this respect a custom is as binding on the parties to the contract as is the law of the land, which enters into every contract although not written there in words. Indeed the custom of a trade is as binding on those who engage in it as if it were that which is commonly known as the law of the land, of which one is not allowed to plead ignorance, unless provisions contrary to such custom are written into the body of the contract. The adoption of such custom is presumed, once it is shown to exist, unless the contrary appears, no

matter whether it be shown that the parties had knowledge of it or not.

In Maclachlan on Merchant Shipping, 361, it is said: "If the usages of a particular port are well known, at least in the trade to which the charter-party relates, it will be held, in the absence of exclusive words in it, to have been affirmed on the basis of such usages, *although to one of the contracting parties these usages at the time were unknown.*"

IV.

Conditions at Honolulu.

Near the end of Finding IV, page 6, it is said that "the wharves at Honolulu are under the control of a harbor-master. The practice of such harbor-master was to assign ships to berths at the wharves in the order of their respective arrivals, and this practice was followed by him in respect to the ships mentioned."

Finding VI. page 6, states that "the docks were crowded and several vessels were moored at the reef. By local regulations of the Government a harbor-master had general supervision of all vessels in the harbor, and all vessels were anchored and assigned to berths in the order of their arrival by the harbor-master. There were no lighters for public use and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharf and

was subject to local regulations and the order of the harbor-master the same as individuals."

These facts do not relieve the Government from liability.

1. The contracts sued on stipulated that deliveries should commence on the arrival of the ships or cargoes on or about certain dates named, and "at the rate of not less than one hundred tons per day." Such contracts fixed the period for discharge as certainly as if the number of days had been written therein.

The rule is that although the number of lay days may not be specified in the charter-party, yet, if they may be arrived at by reason of the rate of discharge having been fixed in the charter-party and the tonnage of the cargo being known, they must be treated as being as definite as if specifically stated.

In *Williams* vs. *Theobald*, 15 Fed. Rep., 468, it is said: "It is also settled that where the contract specifies a certain number of days for loading and unloading and provides that for any detention beyond the lay days demurrage is to be paid at a fixed rate per day, the shipper is held very strictly to its terms, neither a municipal regulation of the port prohibiting the unloading for a limited period, nor delay occasioned by frost, tempest, or by the crowded state of the docks will relieve him from the payment of demurrage. *Randall* vs. *Lynch*, 2 Camp. (N. P.), 352."

In that case, on p. 471, it is also said: "Although the charter-party in the present case does not specify a certain number of lay days, at the expiration of which demurrage is to run, it indicates the rate at which the discharge, when commenced, shall be effected." * * * "The cargo actually delivered at San Francisco was 1,808 tons. Divide this by 100, the lowest number of tons to be secured daily, and we have 19 working days for the period within which the cargo was to be discharged; and this period is fixed with as much certainty as though 19 working days had been originally written in the charter-party as the number of lay days."

2. The parties having contracted in such a way as to fix the rate of discharge, it follows inevitably that local conditions at Honolulu could not relieve them from such contract stipulations.

The general rule is that if the shipper or freighter covenants to do a particular act, which it becomes impracticable for him to do, he must answer for his default. *Cross* vs. *Beard*, 26 N. Y., 85; *Abbott on Shipping*, 307, 387; *Ford* vs. *Cotesworth*, L. R., 4 Q. B., 127; *Williams* vs. *Theobald*, 8 Sawyer, 443, 448; *Allen* vs. *385 Tons of Coal*, 27 Fed. Rep., 316.

Where the contract specifies a certain number of days for loading and unloading, and provides that for any detention beyond the lay days demurrage is to be paid at a fixed rate per day, the shipper is held very strictly to its terms; neither a municipal regulation of the port prohibiting the unloading

for a limited period nor delay occasioned by frost, tempest, or the *crowded state of the dock* will relieve him from the payment of demurrage. *Randall* vs. *Lynch*, 2 Camp., N. P., 352; *Williams* vs. *Theobald*, 15 Fed. Rep., 468.

In 9 Am. and Eng. Ency. of Law, second edition, page 223, it is said: "When demurrage is expressly provided for in the charter-party or bill of lading, the liability of the charterer or freighter is determined strictly by the terms of the contract. If he detains the vessel beyond the lay days he becomes absolutely liable to pay the stipulated demurrage without regard to the cause of the delay, unless he is excused by the terms of the contract, or unless the delay was due to the fault of the ship-owner or his agents. He is liable for delay at the port of discharge as well as at the port of loading, and it can make no difference that consignees have also become responsible."

And on page 242 of the same volume it is said: "As was stated at the beginning of this section, when the charter-party or bill of lading expressly stipulates that the vessel shall be loaded or unloaded in a certain time, or at a certain rate, the contract is strictly enforced according to its terms. Nothing whatever, other than the fault of the ship-owner or his agent, will excuse detention of the vessel beyond the time specified, unless it is so provided in the contract. Thus it has repeatedly been held that the ship-owner is entitled to recover demurrage according to the terms of the contract, or damages in the nature of demurrage, for deten-

tion of the vessel beyond the time specified in the contract, though the delay was caused by the fault of third persons over whom the charterer, freighter, or consignee had no control."

3. But even if there were no contract at all concerning lay days or demurrage, the law will imply a contract that the ship shall be detained a reasonable time only, and that the ship shall have reasonable demurrage therefor.

In Maclachlan on Merchant Shipping, p. 546, the learned author says: "But if it is omitted to ascertain the lay days, the law implies a stipulation for a reasonable time considered with reference to the trade and the port the vessel is in. * * * The law will then imply, it may be, a contract or covenant not to detain the ship longer than such reasonable or fixed time for loading or discharging, or longer than the time fixed for demurrage, entitling the owner to reasonable damages for such detention, notwithstanding it be occasioned by the crowded state of the docks, the state of the weather, * * * in fact, whenever the detention is not attributable to the ship-owner or his agent."

Numerous cases are cited in the notes in support of this text. Again, on page 243 of the same volume, speaking of the ship-owner, it is said: "And he is entitled to recover where the delay was caused by the acts of the Government or by officers at the port of loading or discharging, as the case may be, provided it is not due to his own fault or to that of his agents. The same is true where the delay was

caused by an accumulation of vessels at the dock, making it necessary for the vessel to await its turn."

The notes to the text quoted show that the act of the custom-house officers in unlawfully seizing a vessel, the enforcement of quarantine regulations, and the closing of a port by order of the Government, constitute no defense against claims for demurrage by the ship-owners.

On page 244 of the same volume it is said: "Since no cause other than the fault of the ship-owner or his agent will excuse detention of the vessel beyond the time fixed by the contract, unless there is an express exception, it is usual for charter-parties and bills of lading to except certain causes."

The text-books all state these rules of law. 1 Pars. Mar. Law, 152; 1 Leggett on Bills of Lading, 297–300.

Here the contract sued on contained no exceptions whatever for the relief or the protection of the Government.

4. It will be remembered that Article I of each contract obligates the claimant to deliver the coal, "dangers of the sea and any causes beyond their control excepted." The court below paid no attention to this language.

In 9 Am. and Eng. Ency. of Law, p. 246, it is said: "Often the contract expressly excepts delay not caused by the 'fault' or 'default' of the charterer, freighter, or consignee, or that is due to

'causes beyond his control.' Under such a contract he is generally not liable for delay from causes beyond his control that act directly to retard the loading or discharge."

Such stipulations in the contracts sued on would relieve the claimant from liability because of the acts set forth in the findings above referred to, if any such demand should be made against him. The officers of the Government who prepared the contracts thus furnished the claimant with ample protection, but they did not provide the Government therewith. The absence of such relieving or preventive language is significant, for it makes apparent the intent of the contracting parties that the Government was not to be relieved by such conditions as those set out in the findings of fact.

V.

Getting Wharf at Honolulu.

The court below held that the contract obligations to deliver at the wharf put on the claimant the burden of getting the wharf in Honolulu. We submit that this is not the law.

1. The letters which the claimant and the Government officers wrote agreed that the coals should be "delivered at Honolulu," at a certain price, and a wharf was not referred to therein. The agreement was for delivery at Honolulu generally. The contract prepared by the officers of the Government obligated the claimant to deliver "at the wharf,"

but no wharf was named therein. The officers who prepared it went no farther than to make the contract stipulate a "wharf," thus excluding "ships" and "lighters." They changed the original agreement that much only. The court below found, as a matter of fact, that there were *three wharves* at which coal was unloaded during the periods fixed for the performance of the contracts. Government was entitled to inspect the coal on the wharf before receiving it. 1 Parsons on Ship. 226; Porter on Bills of Lad., 400, 401; Maclachlan on Ship. 369. We submit that these contracts cast on the Government the duty of furnishing or designating the wharf at which it would inspect and receive the coal. The Government had the right, in preparing the contracts, to stipulate that the coal should be delivered at a wharf, or on ships, or on lighters. If the contracts had required that the coal should be delivered on ships or on lighters, would it be contended by the Government that the contracts cast on the claimant the burden of selecting the ships or the lighters? Certainly not. Then why should the contracts be so interpreted as to put on the claimant the burden of selecting or designating the wharf? It stands to reason that the party who is to inspect and receive the coal should designate in the contract, or otherwise, the wharf at which he will receive it, in order that there may be certainty of contract and liability, as well as full protection to him. The officers who prepared the contract would have added the words "to be selected by

J. J. Moore & Co." if they had desired or intended an engagement of that kind. As no particular wharf was named in the contract, the only reasonable inference is that the parties intended that the Government should designate the wharf on the arrival of the ship, and that this designation should be binding upon both parties.

That this is the reasonable interpretation of the contracts is established by the scarcity of authorities on the subject. We have been able to find but few cases in which the question arose, even indirectly; a fact evidently due to the knowledge and practice of the commercial world, that where a wharf, or lighter, or ship of discharge is not named in the contract, the consignee is bound to designate one before receiving the cargo, in the absence of plain language to the contrary.

There is decided commercial advantage in this also. The consignee has the right to assign such contracts, and thus pass the title to the coals to another party, and that party might prefer a wharf which would not have been chosen by the consignee or the ship-owner.

2. Of course this power must be used justly and reasonably.

In Oliver on Shipping, 77, it is said: "A consignee, however, has not a right to order the ship to discharge at any place, excepting the usual and customary places of discharge in the port, unless otherwise stipulated in the charter."

The dispute between the charterer and the con-

signee on a question which relates to the designation of a wharf is analagous, in legal effect, to one between the ship and the charterer on a question of that kind. "Where there are several usual places of loading," says Scrutton on Charter-Parties, 90, 91, "the charterer, not the owner, is entitled to decide what the ship shall do, and has a reasonable time allowed for that decision; but he must choose a berth that is free or to be free in a reasonable time."

On page 92 the author says: "If the charterer will not name a wharf or dock, where none is named in the charter, and there is more than one in the port, he will be liable for any damages occasioned by the delay." * * *

In *Stewart* vs. *Rogerson*, 6 L. R. Com. Pleas, 424, the ship brought an action against the charterer to recover freight and demurrage, pursuant to a charter-party which obligated the ship to "proceed to London and there deliver the same at a good and safe wharf to the freighter or assignees." The ship arrived and the captain was ready to take the vessel to a safe wharf, if one had been named by the consignees, but the consignees "were not only not ready and willing to name a wharf, but positively refused to do so." The court held that the consignees should have named a wharf.

In *Jacques & Co.* vs. *Wilson*, 7 Times Law Rep., 119, the charter-party provided that the ship should load a cargo of timber "and proceed to London, or so near thereto as she might safely get, and deliver same, always afloat." When the ship arrived at

Gravesend, it was ordered to proceed to the Surrey Commercial Dock and there discharge, but it could not do so because that dock was already full of shipping. The court held the ship-owners entitled to demurrage because the charterers had not given proper directions, as it was "their duty to send the ship to some place where she could discharge her cargo."

These cases pass on contract stipulations which are similar in legal affect to those before the court. The rule of law established by these cases is that where the ship is to proceed to a certain port and deliver the cargo "at a wharf," the obligation is on the charterer to select the wharf, or, at least, that he has an option so to do. Having that option, his obligation is the same as if the contracts had read that the cargo should be delivered at a wharf to be named by the charterer.

A case on a contract of that kind is *Tharsis Co.* vs. *Morrell*, Law Rep., 2 Queen's Bench (1891), p. 647. One of the opinions in that case was written by the eminent Lord Justice Bowen, who says, on page 652: "The option is given for the benefit of the person who is to exercise it. * * * The option is to choose a berth or port or dock, that is one that is reasonably fit for the purpose of delivery. * * * The most that can be said is that the charterer does not exercise his option at all unless he choses a berth that is free or likely to be so in a reasonable time."

"But in the absence of an express agreement," says Prof. Parsons, in his work on Shipping,

volume 1, page 311, "there is an implied contract that the owner or consignee of the goods will provide for discharging them in a reasonable time; and it has been held that this time is for the jury to ascertain upon the consideration of all the circumstances."

In Porter on Bills of Lading, sec. 403, it is said: "If no wharf is designated and there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at the one most convenient to the consignee or his assigns."

The author cites as his authority for this proposition of law, *The Boston*, 1 Lowell, 464, where the contract required delivery at Boston to Bosworth & Hamlin, or their assigns. The consignees assigned the cargo to another party and notified the master of the ship that she should not deliver the coal at their wharf, but should proceed to the assignees, which he did, and they ordered him to discharge at the wharf of Cook, Jordan & Morse, and this the master refused to do. After some days of negotiation the master landed his cargo at the wharf to which he had first come, to be held subject to the orders of the assignees, on their paying freight, demurrage, and other charges. The assignees then proceeded in the United States court as libellants for the non-delivery of the cargo. The claimants insisted that the master might deliver his cargo at any suitable wharf, with notice to the consignee or his assignee, and thus fully meet the requirements of his contract, and that the wharf at which the cargo was delivered was suitable. Judge Lowell

said: "There is no evidence of what is usual or suitable in respect to cargoes of coal, but, considering the heavy nature of the cargo, which makes its transportation on land very costly, I am led to doubt whether a usage to land such a cargo at a distance from the owner's wharf could be considered reasonable. In the absence of evidence of usage, I lay down the rule of law, as I did in another case, that when there are two or more wharves in the port equally distant to the carrier, he is bound to deliver at that most convenient to the shipper; at least if he be duly and reasonably notified of such preference. And where one shipper or consignee owns the whole cargo, he has, in my opinion, the same right that the charterer would have to say where the vessel shall discharge, it being of course a suitable place and within the limits of the port."

In that case there was such a stipulation as is set forth in the charter-parties in the case at bar, persuant to the custom of the port at San Francisco, that there should be notice to the consignee of the arrival of the ship in port, and that the vessel should be discharged at the rate of one hundred tons per day, after which the consignee should pay demurrage. Speaking of this feature of the case, Judge Lowell said, on p. 466: "I have more than once construed this new demurrage clause to mean that the owner of the coal is to have twenty-four hours after the notice of the ship's arrival in which to find a berth for her discharge. This construction has not only been acquiesced in, but is insisted on by the ship-owners."

And on p. 467 he said: "It was the duty, then, of the master to deliver at the wharf of Cook, Jordan & Morse, according to the order given him by the libellants, within twenty-four hours after notice of his arrival, and, indeed, at the very time when, in accordance with his contract, he reported to them his arrival."

Because the master of the ship had not properly responded to the directions given by the consignees the decree was in favor of the libellants.

In the case of *Manson* vs. *N. Y., N. H. & H. R. Co.*, 26 Fed. Rep., 923, the contract was that the schooner should deliver 980 tons of coal to the railroad company, "at the consolidated road docks, New Haven, for a specified freight." The bill of lading contained a demurrage stipulation similar to the stipulation on that subject in the charter-parties in the case at bar. The schooner arrived at New Haven harbor and on the following day reported to the agent of the consignee. The consignee owned three docks close to each other, at which coal was delivered, on one of which there were special facilities for handling coal. The schooner lay at the mouth of the channel until February 15, as the result of various causes and conditions, and she commenced discharging the next day. Demurrage was claimed for ten days, and a decree for that amount was entered. On page 926 Judge Shipman said: "Under the terms of the bill of lading the *Sutton* was obliged to discharge at that one of the docks of the consignee which the latter might designate, provided the

designated dock was accessible, by the use of reasonable means by the ship-owner, within a reasonable time. *Nelson* vs. *Dahl*, 12 Ch. Div., 568. The selection of the place of discharge was with the consignee, and the ship-owner was obliged to use reasonable means to reach it. * * *"

This case was appealed to the Circuit Court, where the opinion was written by Judge Wallace and the decree of the District Court was affirmed. The opinion is reported in 31 Fed. Rep., 297. Judge Wallace said, on page 299: "The place of discharge designated in this bill of lading was any one of the several docks of the cónsignee, known as the Consolidated Road Docks, and there was no proof of any usage or custom by which any particular one of these docks was to be treated as the place of discharge. Under this bill of lading, the consignee had the right, and it was its duty, to designate a suitable place for the discharge of the cargo within twenty-four hours after notice of the ship's arrival. This follows not merely from the fact that delivery of the cargo was to be made at any one of several docks belonging to the consignee, all of which ordinarily were equally convenient, or practically so, for the carrier; but because the peculiar phraseology of the demurrage clause implies that the parties to the bill of lading intended that the consignee should have twenty-four hours in which to select a suitable place of discharge after notice of arrival of the ship. *The Boston*, 1 Low. Dec., 464. The bill of lading prescribes what time is to be deemed a

reasonable time on the part of the consignee in which to provide a suitable place for the discharge of the cargo, and exonerates him from liability for any delay occurring during that period without his fault; but it also imports a promise on his part that the running days in which the vessel is to be discharged shall commence at the expiration of the twenty-four hours. *Choate* vs. *Meredith*, 1 Holmes, 500. Any detention of the ship from that time, which occurs without the fault of the carrier, is at the risk of the consignee."

In *Moody* vs. *500,000 Laths*, 2 Fed. Rep., 607, the charter provided that the schooner should "proceed to Point Wolf, N. B., and there load from the charterers a full cargo of laths, and, being so loaded, should proceed therewith to New York and deliver the same; cargo to be delivered within reach of the vessel's tackles, with all possible dispatch, at Point Wolf, and be taken delivery of in like manner." Judge Benedict said: "By this provision the charterers assumed an obligation to designate an unencumbered berth for the loading and discharge of the cargo (*Davis* vs. *Wallace*, 3 Clifford, 133; *Thatcher* vs. *Boston Gas Light Co.*, 2 Lowell, 362), and to furnish cargo at the place of loading as fast as it might be possible for the vessel to receive it."

In *Smith* vs. *Lee*, 66 Fed. Rep., 344, there was a bill of lading which required the ship-owner to deliver coal at the "port of Cambridgeport." The bill of lading contained the usual stipulations as to notice of arrival, lay days, and demurrage. When

the ship arrived at Cambridgeport her master gave notice of arrival and was directed by the consignee to proceed to his own wharf for discharge of cargo. Delays occurred, and in the effort to take the ship to the wharf which had been designated, she ran aground and was not able to reach it. In passing on the questions involved the court said: "The appellants contend that, in view of the fact that the consignee, Smith, owned and carried on his business in a coal wharf in the designated port of delivery, the contract must be construed to be the same as if it had contained an express understanding to deliver at that wharf. We cannot so construe it. The delivery by the bill of lading was to be made to Smith or his assignee. It was therefore in the power of Smith, by endorsement of the bill of lading, to transfer the coal to another, who would then have the right to select a proper place of discharge within the designated port. Upon assignment of the bill of lading, the master would not have been sustained in refusing to comply with the order of the assignee, and insisting, against his will, to discharge at the wharf of Smith. Under this bill of lading an assignee would have the same right of directing where the cargo should be unladen as if mentioned in it by name. In signing it the master would rightly understand that the special place of discharge at his port of destination was undetermined, and would depend on the choice of whosoever might have control of the cargo on its arrival."

In *P. & R. R. R. Co.* vs. *Northam*, 2 Benedict, 1,

the bill of lading described the boat as "bound for Catharine Street, East River, New York," and Blatchford, J., said: "In regard to No. 58, she was bound by the contract to go to Catharine Street. She went there and was then ordered by the respondent to go to Dover Street, and she then went there. Undoubtedly the respondent ordered her to the place where he thought she could be most quickly discharged, but, by the contract, the whole duty of the libellants was discharged in taking the cargo to Catherine Street and notifying the respondent of its arrival and awaiting his orders. This was done."

Decree for libellants for demurrage.

So, in the case at bar, the contract was to take the coals to Honolulu and deliver them at a wharf, which was not named. The claimant discharged his duty by taking the cargoes to Honolulu and notifying the Government of their arrival. It was then incumbent on the Government to designate the wharf at which it would inspect and receive the coal.

In *Reed* vs. *Weld*, 6 Fed. Rep., 304, the libellant contracted to deliver the coal to the respondents, "above three bridges, South End, Boston." When the ship was about to pass the first bridge she was stopped by an order from the respondents to report to them before going through the bridges. The captain went ashore and reported and, on the next day, the respondents sold the coal, and it was agreed that it should be delivered at Warren's wharf above seven bridges. Delays were encountered and de-

murrage was claimed. The court, on the theory that the respondents had the right to designate the place of delivery, held the libellant entitled to demurrage, and a decree was entered accordingly.

So, in the case at bar, the obligation was on the Government to designate the wharf, and the appellant is entitled to the demurrage which he had to pay to the ship-owners because the Government did not meet its obligation.

VI.

Government Should Have Directed Other Delivery.

If the wharves were all occupied on account of a congestion of business, or if they could not be used for any other reason, the claimant had the right to demand demurrage for the time lost in waiting for the Government to take the coal. The Government might have received it on other ships, or on lighters, or on barges, and if it had directed the coals to be delivered on other ships, or lighters, or barges, the claimant would have been obliged to deliver them there or have been deprived of the right to demurrage.

In *Williams* vs. *Theobald*, 8 Sawyer, 443, 448, the court said: "It appears to be well settled in England that where, by the charter-party, the ship is to be brought to a particular dock, or as near thereto as she can safely go, and she is prevented from getting to her primary destination by any perma-

nent obstacle other than an accident of navigation, the ship-owner is entitled to damages for the detention by reason of the charterer's refusal to receive the cargo at the alternative place of delivery, although the obstacle which prevented her from getting into the docks (viz., their crowded state) was not an obstacle endangering her safety. *Nelson* vs. *Dahl*, 12 L. R., Ch. Dw., 568; *Ford* vs. *Colesworth*, L. R., 4 Q. B., 127; *Cross* vs. *Beard*, 26 N. Y., 85."

In *Allen* vs. *785 Tons of Coal*, 27 Fed. Rep., 316, the bill of lading provided that the consignee should receive the coal at New York, "from alongside the ship, not above East River bridge, at a wharf designated by them." The consignee was notified of the arrival of the ship and he designated the foot of Fourteenth street as the place selected for the landing of the coal. The place thus designated was not in conformity with the charter, nor could it be reached in safety, and it was therefore rejected and the cargo of coal was discharged at Boston wharf, *the consignee not having sent lighters to remove it from alongside the ship.*

The court held that the ship had the right to suppose that the consignee would send lighters to take the coal, or designate some other suitable place for the discharge of the cargo. By so doing the consignee would have received his coal without delay to the ship. Judgment was rendered for libellant on the demand for demurrage.

VII.

Reasonable Time to Unload is Implied.

Even if it should be held that the custom of the port of San Francisco to write such charter-parties as are described in the findings of the court below did not become a part of the contract between the parties to the case at bar, still the appellant is entitled to relief.

1. In the absence of any express agreement as to the time for unloading, the law implies a contract to unload within a reasonable time, and if the charterer or consignee fails to do so, through his own fault or that of his agent, he is liable for damages in the nature of demurrage for the detention of the vessel. The rule is stated and numerous authorities are cited in 9 Am. & Eng. Ency of Law, page 253, note 3.

We will consider some of the American cases: *Melloy* vs. *Lehigh Co.*, 37 Fed. Rep., 377, was libel for damages in the nature of demurrage for the detention of two canal boats, by not having loaded them in time. Kurtz, Cook & Co., having purchased coal of the Lehigh Co., deliverable at Port Johnson, drew an order on their superintendent at New York, directing them to deliver the coal to Buchanan Bros. It was stipulated on the back of the order that "no liability for demurrage or other cause is to be incurred by J. D. Kurtz, Cook & Co., or by the cargo, or the consignees thereof, for delay in loading, such delay to be borne by the vessel."

When the order was presented at the office of the Lehigh Company in New York it was stamped as follows: "Accepted subject to the following conditions: The vessel receiving this order is to conform to the directions of the company's shipping agent at the point to which she is sent. No liability is to be incurred for delay, or failure in furnishing a load to the vessel."

There was delay in loading the boats, which was caused by not loading them "in turn," as provided by the order and by the custom of that shipping point.

It would be difficult to imagine a stronger case for the Government on the theory advanced by the majority opinion of the court below than the case we are here considering. In disposing of this question (p. 378) Judge Brown said: "It is contended on behalf of the respondents that on such orders no direct action will lie by the master of the vessel detained for lack of privity of contract, because the respondents' contracts in such cases, it is said, are solely with the drawers of the orders—*i. e.*, the vendees of the coal. The right of a vessel to damages for detention, however, need not rest on express contract. The maritime law makes it the duty of the freighter, or of the owner, or consignee of goods, who undertakes to load or to discharge the ship, to do so with reasonable promptness, and it imposes on him a liability for the damages from detention arising from his negligence or unjustifiable delay. At common law an action of trespass on the case would lie for this breach of duty. *Sprague* vs.

West, Abb. Adm., 548, 553; *Bacon* vs. *Transportation Co.*, 3 Fed. Rep., 344; *Hawgood* vs. *Tons of Coal*, 21 Fed. Rep., 681."

And again on page 379 the court said: "The respondents, therefore, were not only bound under their ordinary maritime duty as freighters to load the vessel without unreasonable delay—that is, in this case, according to the express contract with the drawer—but the implied contract created the same obligation. Upon either ground the vessel has a direct remedy against the freighter, just as she has a direct remedy against any owner of cargo that is bound to unload her, and who has induced her to submit to his direction. *Sprague* vs. *West*, *supra*; *Railroad Co.* vs. *Northam*, 2 Ben., 1; *Crawford* vs. *Mellor*, 1 Fed. Rep., 638; *Houge* vs. *Woodruff*, 19 Fed. Rep., 136, 137, and cases there cited."

In *The Hyperion's Cargo*, 2 Lowell, 93, demurrage was not expressly stipulated for in the bill of lading, but Judge Lowell held that an ordinary bill of lading implied an agreement that the cargo shall be received within a reasonable time after the arrival of the vessel at her port of destination, and that as the cargo had not been received in that time the libellants were entitled to a decree for demurrage.

In the *Z. L. Adams*, 26 Fed. Rep., 655, the action was for damages in the nature of demurrage for delay in unloading the schooner, and Judge Brown said: "As the bill of lading fixed no period for the discharge of the cargo, the only obligation of the consignee or his vendee was to use due dilligence

in procuring a berth and to discharge, according to the custom of the trade."

The vendee or the consignee in that case, not having used such dilligence, damages in the nature of demurrage were decreed.

In *Bacon* vs. *E. & W. T. Co.*, McKennon, C. J., of the Circuit Court, said: "An express stipulation for demurrage in a contract of affreightment is not necessary to entitle the owner of a vessel to compensation for her unnecessary or improper detention in loading or unloading. Reasonable promptness in delivering a cargo at its point of shipment, and in receiving it at its destination, is a duty implied in such contracts, and for a violation of it, damages in the nature of demurrage are recoverable. This is too well settled, both in England and in this country, to need discussion or authorities."

On page 346, the court quotes with approval the language of Chief Justice Denio, in *Cross* vs. *Beard*, 26 N. Y., 85, 89, 91, where, after speaking of the effect of the agreement for demurrage in the charter-party, he said: "But the rule is somewhat different when no period of delay is fixed by the contract. There a reasonable time is implied, and this is to be determined upon by a regard to all the circumstances legitimately bearing upon the case, and it is a question for the jury."

Where the charter or bill of lading is silent as to the time of unloading and discharge, there is an implied contract to discharge the vessel within a reasonable time. *Empire Co.* vs. *P. &*

R. Co., 77 Fed. Rep., 919, affirming 70 Fed. Rep., 268. Numerous authorities are cited in these opinions. To the same effect are *Randall* vs. *Sprigg*, 74 Fed. Rep., 247, and *Hoxsie* vs. *Reuben Doub*, 46 Fed. Rep., 800.

Thus we see the duty to load or discharge the ship with reasonable promptness is cast on the freighter, or the consignee, or the owner of the cargo, and it imposes on him a consequent liability for the damages from the detention of the ship, for which there is a direct remedy against the freighter, or consignee, or the owner of the cargo. In the case at bar the Government is both the consignee and the owner of the cargo.

2. The same rule applies where the liability is *in personam*, or *in rem*, and it is settled that a contract will be implied on the part of the consignee or his assignee to unload within a reasonable time, when no time is specified in the contract, and a libel *in personam* or *in rem* may be maintained against him for damages for breach of such implied contract. This doctrine is stated and numerous cases cited in 9 Am. and Eng. Ency. of Law, p. 255, notes 3, 4, and 5.

VIII.

Acceptance of the Cargoes.

That the Government, having accepted the cargoes as consignee, is liable in the case at bar the same as if it had been the charterer, or a party to a bill of

lading, is clearly established by the authorities, we think. In 1 Parsons on Shipping, 312, it is said: "If it is said in the bill of lading that demurrage is to be paid, the reception of the goods by the party, under such a bill, would be evidence of an agreement on his part to pay the prescribed demurrage; without this clause in the bill, however, there is no claim on the consignee for demurrage as such, although there may be a claim for damages caused by the delay."

It is well settled by the decisions of the courts that the acceptance of a cargo without objection, under the charter-party or bill of lading, imports an agreement to pay demurrage according to its terms.

The question arose in *Sutton* vs. *Housatonic R. Co.*, 45 Fed. Rep., 507, where the bill of lading provided for demurrage, and Judge Brown held that the acceptance of the cargo without objection imported an agreement to pay the demurrage, and he entered a decree accordingly. Judge Brown cited *North German Lloyd* vs. *Heule*, 44 Fed. Rep., 100, and *Neilson* vs. *Jesup*, 30 Fed. Rep., 138.

In *Neilson* vs. *Jesup*, 30 Fed. Rep., 138, it was held that the vessel, in delivering cargo, was not bound to look beyond the owner of the cargo. As he has the control of the delivery and acceptance of the goods, he is responsible, *on accepting the goods under bill of lading*, for freight and demurrage according to its terms. In the court's opinion it is said: "The general rule undoubtedly is that the consignee and endorsee of the bill of lading,

who is owner of the goods and of the bill of lading, and who accepts the goods under the bill of lading, is bound by its terms. If he accepts the goods under the bill of lading, he is presumed to agree to pay the stipulated freight, and to receive the goods within a reasonable time, or within the agreed time, or else pay what the bill of lading requires for the delay." * * * "The vessel is not bound to look beyond the owner and holder of the bill of lading, because he has the right to control the delivery and the acceptance of the goods under it. (*The Thames*, 14 Wall., 98, 107.) For any unreasonable delay in the acceptance of the goods and in enabling the ship to deliver, he is, therefore, primarily responsible. To avoid this responsibility, he must either refuse acceptance or find some other person who, both as vendee of the goods and as assignee and holder of the bill of lading, becomes substituted in his place and to his rights and liabilities, through direct relations with the ship, under and by virtue of the bill of lading."

The consignee of cargo and holder of the bill of lading, even though he is but an agent to sell, is liable for both freight and demurrage. *Gates* vs. *Ryan*, 37 Fed. Rep., 154, opinion by Judge Brown, citing several authorities,

IX.

Liability of the Government.

We think that the authorities clearly establish our view that the Government is liable as consignee for the demurrage paid by the charterer to the ship-owner.

1. We shall review some of the authorities, and we begin with directing the attention of the court to the fact that the Treasury Department, in the opinion of the Comptroller of the Treasury, dated December 15, 1898, 5 Decs. of the Comptroller, 305, held the United States liable for demurrage in a case of the same character. There, William Lamb & Co. claimed demurrage for detention of the schooner *Rebecca J. Moulton*, on a contract entered into with the United States, whereby William Lamb & Co. agreed to ship certain coal for the Government from Norfolk to Key West. In accordance with this contract, William Lamb & Co. forwarded 843 tons of coal on the *Rebecca J. Moulton*, "consigned to the United States Navy, Key West, Fla."

The bill of lading was endorsed by the master of the vessel to J. H. Conant & Co., which firm, we infer from the opinion, owned the schooner. J. H. Conant & Co. endorsed the bill of lading to William Lamb & Co. That endorsement, so the Comptroller held, operated as a waiver of any claim which the master or the owners of the vessel might have against the Government under the bill

of lading. Thus the Comptroller disposed of the master and the owners of the vessel, and narrowed the question of legal right to William Lamb & Co., on the one side, and the Government on the other.

So, in the case at bar, the ship-owners demanded and received demurrage from the charterer or shipper, who is the appellant here, and left him, as he had contracted with the Government, to his rights under the law.

In the case before the Comptroller, it was held that J. H. Lamb & Co., the charterers or shippers of the coal, had the right to recover the demurrage from the United States, the consignee in that transaction. William Lamb & Co., like the appellant here, dealt with two parties, the ship-owners and the Government. In that case, like the one at bar, the ship-owner collected demurrage from the shipper, and the latter made demand therefor on the consignee.

As the Comptroller allowed the claim for the demurrage, it is quite safe to assume that it was paid by the Government. The case is exactly similar ,on the point of liability of the Government, to the case at bar, and it furnishes a practical interpretation of the contracts and the law that is entitled to the serious consideration of this court, as we believe.

2. In *Cranford* vs. *Mellor*, 1 Fed. Rep., 637, there was libel by the owners of the barge to recover damages for detention, although the bill of lading contained no stipulation for demurrage, and

Judge Butler held that the owner of the cargo who delays unloading it after the vessel arrives at the designated wharf, is liable to the owners of the vessel and for damages for its detention, although, by the terms of his purchase of the cargo, *the vessel was employed and the freight paid by the shipper.*

That is exactly the case at bar. Here the Government bought the coal from the appellant, to be delivered at a wharf in Honolulu. The appellant chartered the ship and paid the freight, or the cost of the charter.

Among other things, Judge Butler said in that case: "The difficulty respecting privity between the parties disappears when the ownership of the coal is traced to the respondents. The law implies a contract from the relations of the parties, growing out of the transaction." He cited a number of authorities in support of this proposition of law.

In that case, the owners of the ship could have proceeded against Bright, Thomas & Co., who contracted for the delivery of the coal with which the ship was laden, but instead of that they proceeded against Mellor & Rittenhouse, who had purchased the coal, and a decree was entered in their favor, because the law implied a contract between the ship and the owners of the cargo, Mellor & Rittenhouse.

In *275 Tons of Mineral Phosphates*, 9 Fed. Rep., 209, the action was *in rem* to enforce a lien on a quantity of mineral phosphate lately on board the brig *Dauntless*, for delay in removing the same from the brig aforesaid, and Judge Benedict said: "The claimants were no parties to the contract of

affreightment under which the property had been transported, if such a contract there was, but simply purchasers of the property as it lay in the vessel." * * * "And as, in the eye of the law maritime, upon commercial reasons, the master of the ship is deemed to contract, in respect to the freight, rather with the merchandise than with the shipper, and his rights are, therefore, not made to depend upon any doctrine of agency. *Hyperion's Cargo*, 2 Low. 94. So, upon the same grounds, the contract to remove this merchandise—which merchandise, it must be remembered, was the cargo of the brig actually on board as such—should be deemed to have been made with the merchandise as well as with the buyers thereof, and the merchandise in consequence is chargeable with the loss arising from the non-performance of that contract." Decree for libellants.

So, in the case at bar, the contract, in the eye of the law maritime, must be deemed to have been made with the merchandise as well as with the buyers thereof.

In *Young* vs. *140,000 Hard Brick*, 78 Fed. Rep., 149, it is held that the implied obligation to unload within a reasonable time is not limited to the shipper and the assignee, but extends to purchasers of the cargo, even when there is no assignment of the bill of lading.

In *Falkenburg* vs. *Clark*, 11 R. I., 278, 283, the court said: "For while it is held in many cases that the demurrage cannot be recovered on a special count for demurrage, unless there is a special pro-

vision for demurrage, it is well settled by the more modern cases that the consignee will yet be held liable in a proper action for any delay caused by himself. *Abbott on Shipping*, 306; 1 *Kay on Shipmaster & Seaman*, 151; *Cross* vs. *Beard*, 26 N. Y., 85; *Morse* vs. *Peasant*, 2 Keyes, 16; *Ford* vs. *Cotesworth*, L. R., 4 Q. B., 127, 136."

As far back as *Jesson* vs. *Solly*, 4 Taunton, 52, decided June 29, 1811, it was a new thing to bring an action against the consignee on the general count in assumpsit for demurrage, but Lord Mansfield held "that if the consignee would take goods, he adopts the contract."

Heath, J., said: "It is clear the plaintiff is entitled to demurrage, either from the consignor or consignee."

Chambers, J., said: "It would be monstrous, if the consignee, accepting the contract with knowledge of the terms, should not be bound by it and could send the captain back to the consignor for demurrage."

So, in the case before this court, the vessel-owner might have proceeded against the consignee for demurrage, but he preferred to get it from the charterer, although it was the consignee who was in fault. The ship-owner collected the money from the charterer and it is that damage which the charterer is here endeavoring to collect from the consignee. The charterer paid that which he was obliged to pay through the fault of the consignee, pursuant to the terms of the charter and the provisions of the law. As it was the act of the

consignee which caused him that loss, he has the right to proceed against the latter for the damages occasioned by his wrong.

In *Mitchell* vs. *Langdon*, 10 Biss., 527, Judge Blodgett held the consignee liable to the owners of the ship for unreasonably delaying its unloading.

In *Wright* vs. *New Zealand Co.*, L. R., 4 Exch. Div., 165, 170, Thesiger, L., J., said: "The contract between the parties to this action was that which the law implies, namely, that the ship should be unloaded at her port of discharge within a reasonable time. A reasonable time means a reasonable time under ordinary circumstances, and in the absence of some stipulation altering the implied contract between the parties, the charterers would not be relieved from the consequences of fortuitous or unforseen impediments, affecting only the due performance by them of their part of the contract."

In that case there was no stipulation in the charter-party concerning the time of unloading.

In *Tillett & Co.* vs. *Cwm. Avon Works*, 2 Times Law Rep., 675, the ship-owners sued the consignee for damages for delay in unloading. In the bills of lading there was no stipulation as to the time for unloading, and the vessel could only be discharged at one of three berths, the property of the consignees, which, at the time of the arrival of the ship at the port, had all been occupied by other vessels with cargoes belonging to the defendants. It was held that, it having been an implied term in the contract that the defendants

should discharge the cargo within a reasonable time, the ship-owners, under the circumstances, could recover damages for the loss occasioned by the delay.

In *Carver on Carriage by Sea*, sec. 644, it is said: "The person responsible for demurrage due under a charter-party is ordinarily the charterer; and he continues liable, although other persons also may have become responsible, whether as shippers or as holders of the bill of lading. The charterer must still carry out the terms of the contract or see that they are carried out. Thus, he continues liable to give proper orders as to the port of discharge, to pay the freight, to see that the delivery of the cargo is taken in proper time or demurrage paid, and so forth."

In section 712, the author, in discussing the subject of damages for detention, says: "A fundamental principle is that compensation ought to be made to the party who has been wronged by the breach for the losses which he has sustained in consequence of it; that he ought to be placed in the same position, pecuniarily, as if the contract had been performed and not broken."

The application of these principles to the case at bar will give to the appellant the demurrage or damages which he had to pay the ship-owners, because such payment was caused by the wrongful omissions and acts of the Government. In that way only can he be placed in the same pecuniary position as if the contract had been performed.

X.

What is Nature and Scope of Action?

The question naturally arises as to whether this action is based on the maritime law of demurrage or is in the nature of an action on the case for the damages resulting from the detention of the ships. It makes no difference in legal effect whether the claim be treated as one of demurrage or for damages in the nature of demurrage; in either event it is to be governed by the law of the sea.

1. *Is it Action on the Case?*—If a vessel is improperly detained, the owner may have a special action for damages. Abbott Ship., 304; *Horn* vs. *Bensusan*, 9 Car. & P., 709; *Kell* vs. *Anderson*, 10 Mees. & W., 498; *Evans* vs. *Forster*, 1 Barn. & Ad., 118; *Clendaniel* vs. *Tuckerman*, 17 Barb., 184; 1 Pars. on Ship., 312, 313; Porter on Bills of Lad., 356; Scrutton on Charter-Parties, 299, 511.

Whether this be demurrage or not, the United States is liable in an action on the case for the damage resulting to the claimant by the improper detention of the ship, no matter whether there was a contract or not, or whether the bill of lading or charter contained a stipulation for demurrage, lay days, or detention, or not. 1 Pars. Maritime Law, 263, n.; 1 Pars. on Ship., 311; *Kell* vs. *Anderson*, 10 M. & W., 498; *Clendaniel* vs. *Tuckerman*, 17 Barb., 184; *Robertson* vs. *Bethune*, 3 Johns., 342; *Sprague* vs. *West*, Abbott Adm., 548; *Horn* vs. *Bensusan*, 9 Car. & P., 709; Abbott (Lord Tenterden)

on Law of Ships and Seamen, 241; Maclachlan on Shipping, 545, 546, and the cases we have cited in other parts of this brief.

2. *Is it for Demurrage?*—An improper detention of a vessel, however occurring, whether it be for time lost in making the necessary repairs occasioned by a collision or as the result of a breach of contract, express or implied, is considered as demurrage, and damages may be recovered in an action brought *eo nomine.* This is a general rule. *The Apollon*, Wheat., 378; *Williamson* vs. *Barrett*, 13 How., 101; *Sprague* vs. *West*, Abb. Adm., 548; *The M. S. Bacon* vs. *Erie & W. Transp. Co.*, 3 Fed. Rep., 344; *Randall* vs. *Lynch*, 2 Camp. (N. P.), 352, opinion by Lord Ellenborough; 3 Kent's Com., side p. 203; Maclachlan on Merchant Ship., 541, 545; 1 Pars. Mar. Law, 261; Abbott on Ships, 241; Desty on Ship., 246.

3. *Lay Days, What are they?*—We are now led to ask what is a *lay day?* Chancellor Kent says: "Being the days allowed to load and unload the cargo." 3 Kent's Com. side p. 203.

To the same effect are 1 Pars. Mar. Law, 261; Abbott on Ships, 241–243; 1 Pars. on Ship., 310; Maclachlan on Ship., 546; Desty on Ship., 246.

4. *When do Lay Days Begin?*—Lay days begin to run on the arrival of the vessel at the entrance of her dock, or other place of discharge, and not when she has merely reached the port of delivery. *Where notice of arrival was given to the consignee,*

the lay days begin to run after the time specified in the bill of lading. Desty on Ships, 246; 9 Am. and Eng. Ency., 2d ed., p. 234, 235, and numerous cases cited.

5. *What of Sundays and Legal Holidays?*—It is settled that the exception of Sundays and legal holidays from lay days does not apply to demurrage days, and the ship is entitled to demurrage for every day's detention after expiration of lay days. *After demurrage all days are counted.* Oliver on Ship., 4; Scrutton on Charter-Parties, 234; *Lindsey* vs. *Cusimano*, 12 Fed. Rep., 503, 504; *Hull* vs. *Cargo of Pig Iron*, 37 Fed. Rep., 124; *The Glenfilis*, 42 Fed. Rep., 232.

6. In concluding this branch of the argument we will say that the obligation of the Government was to receive the coal from the vessels "at the wharf" in the port of Honolulu; the cargoes were taken to and received in that port, and the Government did not keep the contract otherwise. If the officers representing the Government made an improvident or unwise contract to receive the coal "at the wharf," the fault is to be imputed to the Government and not to the appellant. The Government should have received the coal on ships, vessels, barges, lighters, or some other craft, while the ships were lying at anchor in the harbor, or it should have furnished berths or docks so that the ships could lie alongside them, being always afloat. The contract obligated the Government to do such or so many of these things as might be necessary to

enable the claimant to deliver the coal at the wharf within the time prescribed by the contracts. Failing so to do, the Government must pay the damages in the way of demurrage occasioned by such delays.

XI.

Refusal to Take Coal.

The fifth finding of fact. (p. 6) is as follows: "The coal actually delivered under the second contract was 4,634 tons, completed October 7, 1898. About a month subsequent to this claimant purchased 366 tons of coal of the barkentine *Omega*, then in the Honolulu harbor, and tendered the same to the defendant upon its contract of June 23, 1898, but the defendant refused to receive it, whereupon claimant sold the same in market, for the best price he could obtain, at $3.06¼ per ton less than $9, the contract price with the defendant, equivalent to $1,120.87."

Chief Justice Nott's dissenting opinion on this branch of the case is at page 16 of the Record.

In *Brawley's case*, 11 Ct. Cl., 522, was considered the true rule for the interpretation of the words "more or less" and their equivalents "about," "say," and "by estimation" in contracts made with the United States for the delivery and sale of merchandise or commodities. The cases are discussed by the court at some length, and on page 532 this rule is laid down: "When the contract is for the sale or delivery of a specifically named quantity of goods or articles, and the words 'more

or less' are added, with no reference to any other method of determining more exactly the quantity intended, or of removing the uncertainty created by those words, then the parties will be held to a quantity approximate to that specifically named, *allowing only such a slight variation therefrom as from the circumstances of the case or the nature of the articles to be delivered may seem to the court to be reasonable.*" (The italics are ours.)

In applying the facts to the rules of law laid down, the court held that there was other language in the contract which showed conclusively that the words "more or less" were not intended to be restricted to a small variation only of the quantity named, but were to have their full force and effect, and that it was contemplated that the quantity might be increased much beyond that specified in the contract; but the contract in that case contained language which is not to be found in the contract of the case at bar.

That case went to the Supreme Court of the United States, where the judgment was affirmed, and is reported in 96 U. S., 168. Mr. Justice Bradley wrote the opinion of the court, and on pages 171, 172, he laid down this rule: "But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words, 'about,' 'more or less,' and the like in such cases is only for the purpose of providing against acci-

dental variations arising from slight, unimportant excesses or deficiencies in numbers, measures, or weight."

Immediately following this rule, he gives a lengthy description of what will be considered "independent circumstances," and, at the top of page 173, he applied the rule to the case before the court, saying that the contract was not for the delivery of any particular lot or any particular quantity, but was to deliver at the post 880 cords of wood, "more or less as shall be determined to be necessary by the post-commander for the regular supply, in accordance with Army Regulations, of the troops and employees of the garrison of said post for the fiscal year beginning July 1, 1871." And thereupon he said: "These are the determinative words of the contract, and the quantity designated, 880 cords, is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. The substantial engagement was to furnish what should be determined to be necessary by the post-commander for the regular supply for the year, in accordance with Army Regulations. The post-commander, as soon as he learned of the contract, and within four days after it was signed, informed the claimant that but 40 cords of wood would be required thereon, and forbade his hauling any more to the Government yard."

Two cases more unlike than the *Brawley case* and the case at bar are seldom found. In the case at bar the first article of the contract obligates the claimant

to furnish and deliver "about five thousand tons" of coal; and the fifth article is as follows: "That for and in consideration of the faithful performance of the stipulations of this agreement the parties of the second part shall be paid at the office of the Quartermaster U. S. Army, who shall be designated by the Quartermaster General U. S. Army, at San Francisco, Cal., as follows: for five thousand (5,000) tons * * * steam coal as specified, the sum of nine dollars ($9) per ton of 2,240 pounds, in gold coin of the United States."

The sixth article is also of interest: "That in case of failure of the said parties of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part shall have the power to supply the deficiency by purchase in open market, and to charge up against the parties of the second part the extra cost over contract price of any coal so procured."

It will be observed that the word "about" is used only in article one of the contracts, and that in the fifth article the United States explicitly promises to pay for 5,000 tons of coal. It is on that stipulation that this suit is predicated. By it the Government contracted and agreed to receive 5,000 tons.

In *Brawley's case* the contractor agreed to furnish whatever wood the army officer might consider to be necessary for the troops and employees at the post. There is no such stipulation to be found in the contract sued on here.

We are strengthened in this view by the sixth article of the contracts, which gives to the United States the power to supply the deficiency by purchase in open market, charging up against the contractor the cost over the contract price of any coal so procured. Will counsel for the Government say, or can this court say, that the deliveries made to and received by the United States under this contract, lacking, as they did, 366 tons of coal, were so near compliance with the contract that the Government would not have had the right to buy 366 tons of coal in the open market and charge its loss against the contractor? Looking at the case from that standpoint, is it not perfectly clear that the contractor would have been held in default to the United States if he had failed to deliver that 366 tons of coal? Putting 20 tons of coal in a car, it would have taken a train of eighteen cars to haul this coal, which counsel for the Government seems to think an insignificant amount. At $9.00 per ton it would take $3,294 to buy this trifling quantity of coal. It may be not amiss to say that 366 tons of anthracite coal, delivered in this city within one week in the winter of 1892–3 would have dispelled the gloom from 1,000 homes. This amount of coal cannot be considered a bagatelle or classed among the "trifles light as air."

This coal, 366 tons, might be of vast importance to a warship. We get the following facts from a table which we were allowed to examine in the Bureau of Steam Engineering in the Navy Department. That table shows nineteen warships of less

than 366 tons, and thirty of more than that bunker capacity. Of the smaller ships, the cruiser *Detroit* has a bunker capacity of 335 tons, and can make 10 knots an hour for a day by using 27 tons, or can run at full speed for one day by using 65 tons of coal. Of the larger ships, the *Indiana* has a bunker capacity of 1,375 tons and can make 10 knots an hour for a day on 76 tons, and runs full speed one day on 160 tons. The *Oregon* has a bunker capacity of 1,556 tons, makes 10 knots an hour for one day on 65 tons and can run at full speed one day by using 140 tons of coal.

Thus it appears that the 366 tons of coal tendered by the claimant and refused by the Government would have filled all the bunkers of the *Detroit*, and would have run that ship at full speed more than five days. It would have run the *Indiana* at full speed for more than two days, and the *Oregon* at full speed for nearly two and one-half days. When the *Oregon* left Puget Sound on her historic voyage round Cape Horn, she only held four times as much coal as the claimant tendered to the Government. And yet we are told that 366 tons is such an insignificant quantity of coal that the defendant is excused in law for refusing to receive it on the appellant's contract.

The next case cited by counsel for the Government is *Norrington* vs. *Wright*, 115 U. S., 188, Mr. Justice Gray writing the opinion. The court approved the rule which we have already quoted from in *Brawley* vs. *The United States*, 96 U. S., 168, 171, 172. In *Norrington* vs. *Wright*, Etting entered

into a contract with Wright by which he sold for the account of Norrington 5,000 tons of iron rails for shipment "at the rate of about one thousand tons per month." The court held that the sellers were bound to ship one thousand tons in each month from February to June, inclusive, except that slight and unimportant deficiencies may be made up in July; and if only 400 tons are shipped in February, and 885 tons in March, and is informed that no more had been shipped in February, but gets that information after the arrival of the March shipment and before accepting or paying for either of them, he may rescind the contract by reason of the failure to ship about one thousand tons in each of the months of February and March. At the bottom of page 204 Mr. Justice Gray holds that the case comes within the general rule heretofore quoted from the *Brawley case* and said: "The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity;" * * * "the plaintiff instead of shipping about one thousand tons in February and about one thousand tons in March, as stipulated in the contract, shipped only four hundred tons in February and eight hundred and eighty-five tons in March. His failure to fill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of decision."

We think that little more need be said on this branch of the case, for it seems to us that we have shown that all of these cases are clearly and unequivocally adverse to the position taken by the majority of the court below.

We submit that the judgment of the court below should be reversed in all things, and that this court should direct a judgment for the appellant for the amount of each item claimed.

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